ICO's consultation on the draft data sharing code of practice Summary of responses and ICO comments

Introduction

Section 121 of the Data Protection Act 2018 (DPA 2018) requires the Information Commissioner to prepare a code of practice providing practical guidance on data sharing. A previous data sharing code was published in 2011 under the Data Protection Act 1998.

We consulted appropriate stakeholders by means of a formal public consultation in July-September 2019, preceded by a call for views in 2018. Since then, we have been undertaking further work on the code and other resources to support data sharing. The Information Commissioner has now submitted the final version of the code to the Secretary of State as required under section 125 of the DPA 2018. This will be laid before Parliament by the Secretary of State when Parliamentary time allows.

The new code explains and advises on changes to data protection legislation where these changes are relevant to data sharing, including:

- transparency;
- lawful bases for processing; and
- the accountability principle.

As well as legislative changes, the new code also deals with technical and other developments that have had an impact on data sharing since the publication of the last code. It has also been informed by our experience gained during the 2020 response to the coronavirus pandemic.

We are also taking this opportunity to publish the responses received to the consultation we issued on the new draft code on 16 July 2019, along with a thematic summary drawn from those responses, as we did for the responses to the call for views launched back in August 2018.

This concludes phase one of our work on the code, pending Parliamentary approval. The publication of the code is accompanied by resources to help organisations, such as tools and case studies.

Phase two will comprise further information and resources to supplement the code on our website. This phase will be ongoing and the materials will serve as a continuous information tool for organisations that are involved in data sharing.

Consultation

Before drafting the code, in August 2018 the Information Commissioner launched a call for views. We collated the responses and used them to inform our work in developing the new draft data sharing code.

On 16 July 2019 we launched a consultation on the draft code, the responses to which helped shape our work on the final version of the code.

Our consultation survey covered some of the key issues we needed to consider, and posed a number of open questions. We received responses from a wide range of private, public and third sector organisations, as well as individual members of the public acting in a private capacity.

In total, we received 152 responses to the consultation:

- 54 of these were completed on the web-form survey;
- 57 were responses to the survey sent via email; and
- 41 were separate comments from respondents sent via email.

One response was received by post and two responses were spoiled.

As promised when launching the consultation, we are publishing all responses, except those where the respondent indicated that they were acting in a private capacity (ie as a member of the public). The responses are available to read on our website.

We have published in full all responses to the consultation:

- from organisations; and
- from individuals responding in a professional capacity;
- except for names, email addresses, telephone numbers and other forms of personal data, which have been redacted; and
- except for spoiled responses.

We have been able to publish a significantly higher proportion of responses than for the call for views, for the following reason. During the call for views, it was not always explicit on the web-form survey responses whether submissions were being made on behalf of an organisation or from an individual merely identifying an organisation that they worked for. This limited the number of call for views responses that we could publish. As part of the 2019 consultation survey, we made it easier to determine whether a respondent was replying on behalf of an organisation or as an individual acting in a professional capacity, rather than an individual in a private capacity.

Key themes

Scope

Over half of survey respondents said that the draft did not cover case studies or data sharing scenarios relevant to their organisation.

In general, respondents wished to see more examples and case studies throughout the code, relating to areas including:

- the private and not-for-profit sector;
- education;
- research;
- processing special category data;
- demonstrating 'data protection by design';
- recording processing activity;
- DEA powers;
- sharing children's data;
- good and bad practice; and
- data sharing within devolved areas.

Some respondents commented that it would aid understanding to include examples and case studies in all sections of the code, where possible.

A number of respondents stated that the code should cover controller to processor data processing, rather than just controller to controller processing. Some respondents noted that controller to processor data processing was expressly excluded from the code and argued that this was very limiting. Other respondents also wanted the code to cover data processing within organisations. Some suggested that a section could be written from the perspective of a data subject (eg a patient wanting to know more about how their data is being used).

A number of respondents wanted the code to provide guidance on international transfers, and in particular, data sharing outside the European Economic Area (in particular with the USA). They asked for the code to explain how such data transfers could be affected by the UK leaving the EU, including the implications of the UK leaving the EU without a deal.

Several respondents felt the code should cover the exemptions and restrictions laid out in schedules 2-4 of the DPA 2018, particularly the crime and taxation exemption. Some felt that a whole section should be dedicated to this topic, rather than exemptions being mentioned throughout the code. Similarly, a significant number of respondents wanted the code to cover anonymisation or pseudonymisation of data, rather than linking to external guidance on the subject.

A number of respondents also wanted the code to include more detail on competing legal or regulatory requirements such as the common law duty of confidentiality or requirements within the Human Rights Act 1998.

ICO comments

- This will be a statutory code which can only be updated in the future by re-laying before Parliament. To ensure it remains as up to date as possible, the code therefore features external links which direct the reader to ICO guidance and other items which are expressly stated to be outside the code, but which reflect the latest position.
- We have wished to avoid making the code even longer by replicating information which is readily available on the ICO website.
- As stated above, we are also working on a data sharing hub that will be linked to the code and will contain further information and resources, some of which may have a sectoral focus. We welcome suggestions as to content and future case studies.
- We have added more examples to the final version of the code, particularly relating to the private sector.
- As stated in the code, processing between controllers and processors is covered by specific ICO guidance.
- We have clarified in the code that it does not apply to the 'sharing' of data within the same organisation, where the controller is one and the same.
- With regard to the implications of UK exiting the EU, we had been waiting for the position to become clearer. Now that the UK has left the EU, we have stated the current position in the code, and we have directed the reader to the ICO website for the latest guidance.
- Exemptions are covered in specific ICO guidance and it continues to be our view that it is preferable for stakeholders to refer directly to that guidance.
- The ICO is currently working on new guidance on anonymisation and pseudonymisation. The code therefore directs the reader to our website.

Balance

During the call for views, respondents were asked whether the old 2011 code struck the right balance between recognising the benefits of data sharing and the need to protect personal data. 54% of the responses said that the 2011 code had failed to strike the right balance. As part of the consultation survey, we repeated the question for the new draft code and over 75% of the survey respondents thought it succeeded in striking the right balance.

Despite this, some respondents commented that the draft code did not focus enough on the benefits of data sharing, and in particular, the potential harm of not sharing.

A significant recurring theme was that the draft code was disproportionately aimed towards the public sector, with a number of respondents wanting to see a better balance of guidance, examples and case studies for private and not-for-profit organisations throughout the code.

Similarly, several respondents were concerned that the draft code was disproportionately targeted towards larger organisations, which are already better resourced to comply than small and medium-sized organisations, as they can afford data protection consultants and advisors. It was therefore the view of a significant number of respondents that the code should include guidance aimed at smaller organisations, perhaps in a dedicated section.

ICO comments

- We are pleased by the positive response to the balance in the new draft code between recognising the benefits of data sharing and the need to protect personal data.
- In response to comments, we have given an increased emphasis in the code to the benefits of data sharing and the potential for harm when data is not shared. We have also emphasised the benefits of fair and proportionate data sharing to public trust. However we have continued to stress the need for compliance with data protection law.
- As stated earlier, we have added more content to the code that is relevant to the private and social sectors. We are also working on a data sharing hub which may include more detailed information. We welcome suggestions as to what would be helpful to include.
- The ICO has produced a new hub providing data protection advice to small and medium-sized organisations (SMEs). As part of this we are publishing a simple guide on data sharing for SMEs.

Guidance

There was a clear appetite for more guidance on data sharing between part 3 (processing for law enforcement purposes) and part 2 (general processing under the GDPR) of the DPA 2018. In general, respondents felt detail was lacking with regard to part 3 processing. Some suggested that including GDPR and part 3 in the same code is too complex and it should be split into separate documents.

Emergency and urgent data sharing are covered in their own section in the code. However, a significant number of respondents felt more detail is needed. In particular, they wanted clarity on what constituted an emergency or urgent situation with more examples, particularly relating to the private sector.

Many respondents wanted more detail on what should be included within data sharing agreements (DSAs), particularly with regard to the respective responsibilities and liabilities of parties within the agreement (eg for upholding individual data rights and reporting breaches within the 72 hour timeframe). Others commented that the code should specify the practical differences in policies and procedures that should be included within DSAs for different types of data sharing (eg ad hoc and routine) and different types of parties (separate controllers or joint controllers). A number of respondents noted that a DSA template would be useful and sought clarification on instances where DSAs would and would not be compulsory.

Numerous comments related to the lawful basis section. While some felt this replicated existing ICO guidance, others wanted this section to be expanded. In particular, respondents wanted more clarity on how to determine the lawful basis for sharing data. Most of these comments focused on the Legitimate Interests basis and the Public Task basis. Other respondents felt that the Legal Obligation and Contract bases had been glossed over in the code.

Some respondents considered that uncertainty persists over establishing whether an organisation is a controller or processor for a particular processing activity. Others also wanted clarity on determining whether organisations should be considered separate or joint controllers for a particular processing activity.

There were also a significant number of comments on the data ethics and data trusts section in the draft version of the code. Some respondents wanted greater clarity on what is meant by 'ethical principles' and what methodologies the ICO will use to assess the ethical use of data. Other respondents argued that data ethics and data trusts should be dealt with in separate sections of the code.

ICO comments

- As previously stated, the code is not intended to replicate detailed ICO guidance, and it therefore directs the reader to specific, relevant resources, including guidance on lawful bases and on controllers and processors.
- We have added more detail to the code on data sharing between part 2 and part 3 of the DPA 2018, as planned. In particular we have explained how sharing may take place between competent authorities and organisations that are not competent authorities.
- We are also publishing a toolkit on data sharing between parts 2 and 3 of the DPA 2018, to help organisations who are asked to share personal data with

competent authorities such as the police.

- The ICO is publishing specialist guidance on law enforcement processing under part 3 of the DPA 2018 and we have therefore directed the reader to the website. It is our view that part 3 data sharing does need to be referenced in the data sharing code, but the more detailed website guidance will complement it.
- In relation to emergency data sharing, we have provided greater clarity on what should be considered an emergency for data sharing purposes.
- The code explains what a data sharing agreement should cover. Data sharing agreements are not compulsory, but they are good practice and are very helpful to organisations sharing data. The content required for data sharing agreements will vary very significantly between different organisations and sectors, which have differing needs. We are not planning to produce a template; however we will bear in mind the comments.
- The final version of the code no longer contains sections on data ethics and data trusts, although the code does stress the need to consider ethics. The ICO is continuing to work on both areas.

Size, structure and detail

Several respondents commented that the length of the code might prove overwhelming and difficult for practical use, particularly for smaller organisations. They called for the code to be reduced in length, and made more concise and less repetitive. Some suggested that where significant ICO guidance on a subject already exists, certain sections of the code could be reduced or removed, and replaced with a link to such guidance. Others expressed the converse view, seeking more detailed content in the code.

Just over half of survey respondents agreed that the draft code contained the right level of detail, but others felt that the code was not detailed or clear enough in certain areas such as: ad hoc / ongoing sharing, data protection principles, demonstrating accountability, transparency requirements, security, managing individual rights, when to carry out a DPIA and the requirements for joint controllers under Article 26 of the GDPR.

Other respondents felt that the code was very comprehensive, but they made suggestions on how the structure of the code could be altered to better allow organisations to navigate to areas relevant to them. Suggestions included the use of a flow chart, a decision tree, a quick reference guide, checklists where appropriate, an index or a glossary.

ICO comments

- In the code we have sought to strike a balance between the length and the appropriate amount of content. As previously explained, we have directed the reader to specific detailed guidance and resources external to the code, on the ICO website and elsewhere.
- We have added updated checklists to Annex A and template forms to Annex B, as well as a new glossary and a guide to navigating the code. We are working on other supporting materials.
- Each section of the code is hyperlinked from the table of contents in the pdf version of the code, and the data sharing hub will be easy to navigate.

Clarity and confidence

Over 80% of survey respondents either agreed or strongly agreed that the code was clear and easy to understand.

A number of respondents wanted clarity on which requirements within the code are 'best practice' and which are compulsory. Some felt using language such as 'must' rather than 'should' incorrectly implied that certain best practice advice was mandatory.

Some respondents said they were unfamiliar with various terms and abbreviations used throughout the code. In particular, some organisations were unsure of the difference between anonymised and pseudonymised data. As noted earlier, a few respondents suggested a glossary might resolve this issue. Others felt the use of certain words were too vague and needed clearer definitions, such as 'fairness' or what constitutes 'appropriate security measures'.

A number felt the technical terminology used makes the code less accessible to smaller organisations unfamiliar with data protection jargon.

ICO comments

- We are pleased that most respondents have found the code clear and easy to understand.
- In the code we have used the word 'must' when something is mandatory.
- We have added a glossary to the code to assist the reader.
- Some terminology is explained in relevant ICO guidance, to which we have provided links from the code. It would not be practical for the code to explain

all data protection terms in detail.

- As explained above, we have developed more guidance for SMEs.

Next steps

Now that we are publishing the new data sharing code, the first phase of our two-phase approach is complete and we are moving on to phase two.

We are working on additional guidance and resources on our website that will supplement the code, some with a sectoral focus. The data sharing hub will be a live, updatable resource.

It is our intention that the data sharing hub will be a continuous source of information and examples for organisations involved in data sharing. We welcome suggestions for items to include. Please contact us at datasharingcode@ico.org.uk.